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Supreme Court, U.S.
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NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THOMAS W. STEVENS, LARRY WEISSMAN, RONALD LANDBERG, JEFF HUESTON,

PETITIONERS,

-v-

STATE OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA

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November 12, 1985

PETITIONERS PRO SE

QUESTIONS PRESENTED

1. Is the Federal right of a defendant to be informed of the nature and cause of the accusation against him violated by a state accusatory pleading which does not inform the defendant of what specific unlawful act the prosecution intends to prove at trial?

2. Both Federal and California authority forbid as violative of the Fourteenth Amendment selective prosecutions, and require trial courts to hear and assess evidence that a prosecution is selective, rather than even handed. If a motion to dismiss based on substantial evidence that the prosecution is selective is denied on the sole basis of conclusionary affidavits by prosecutors that the prosecution is not selective, does this violate Fourteenth Amendment protection?

3. Can an arrest by a police officer

be retroactively transformed into a citizen's arrest for the purpose of evading the exclusionary rule, and, even if so, should evidence seized by police officers in a search subsequent to a citizen's arrest be suppressed when the prosecution presents no evidence at all that the citizen had a right under the law to make the arrest?

4. Can the Sixth Amendment right of a defendant to have compulsory process for obtaining witnesses be supplanted by an offer from the prosecution to attempt to itself subpoena a crucial defense witness?

5. If a United States citizen is convicted in a state court by means of flagrant violations of state law, and these violations are ratified by state appellate review, does this create for purposes of certiorari by the United States Supreme Court an independent federal ground of denial of equal

protection of laws guaranteed by the Fourteenth Amendment?

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PETITIONERS,	)
-v-	)
STATE OF CALIFORNIA,	)
RESPONDENT.	)

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA

Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment on Appeal of the Appellate Department of the Superior Court of the State of California, in and for the City and County of San Francisco, affirming

Judgments of Conviction made and entered in the Municipal Court of the City and County of San Francisco, State of California.

OPINIONS BELOW

The Judgment on Appeal and Memorandum of Opinion of the Appellate Department, Superior Court in and for the City and County of San Francisco, State of California, is unreported, and is printed in the Appendix hereto, at pages 1a to 138a. An Order In Re: Petition for Rehearing and Application for Certification to the Court of Appeals of the same Court is unreported and is printed in the Appendix, pp. 158a-159a.

JURISDICTION

The Judgment and Memorandum of Opinion of the Appellate Department of the Superior Court, in and for the City and County of San Francisco, State of California (Appendix, pp 1-138a; 155a-157a was entered on August 26, 1985. A timely petition for

rehearing to that court was denied by operation of law (California Rule of Court 107) on September 25, 1985. A timely application made to the Appellate Department for certification to the California Court of Appeal was denied by operation of law (California Rule of Court 63) on October 7, 1985.

Although the petition for rehearing and the application for certification were denied by operation of law on September 25, 1985 and October 7, 1985, respectively, the Appellate Department of the San Francisco Court issued an order denying the petition and application on October 29, 1985.

On October 7, 1985, the Appellate Department issued an Order Staying the Issuance of the Remittitur until November 12, 1985 to allow petitioners time to file this petition.

Petitioners invoke the jurisdiction of this Court under Title 28 Section 1257 (3) of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Sixtn Amendment to the United States Constitution provides:

> In all criminal prosecutions,the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

> obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Petitioners Thomas Stevens, Ronald Landberg, and Jeff Hueston were arrested on August 14, 1982 following an incident which occurred in front of their workplace. Each was charged with battery (California Penal Code section 242) and false imprisonment

(California Penal Code section 236). Petitioners Thomas Stevens, Larry Weissman, Ronald Landberg, and Jeff Hueston were arrested on August 26, 1982 at the same location, and each was charged with battery. In addition, Weissman was charged with carrying a concealed firearm (Penal Code section 12025(b)), carrying a loaded firearm in public illegally (California Penal Code section 12031), and fighting (California Penal Code section 415). All of the charges were misdemeanors. The complaints are included in the Appendix at pages 178a-186a.

Petitioners appeared pro se throughout the proceedings. The cases were consolidated and tried together in the interest of judicial economy. (Municipal Court case numbers were 536093, 536094, 536095, 538321, 538642, 538640, and 538638).

Petitioners are members of the White Panther Party.

On August 13, 1982, the White Panther Party began circulating a petition to recall the Mayor of San Francisco. Petitioner Larry Weissman was one of the two proponents of the recall. Petitioner Thomas Stevens was the spokesperson for the recall. The arrests in these actions occurred one day and thirteen days after the petition campaign commenced. Complaints were filed on August 26, September 7, and September 16, 1982.

On January 13, 1983, the White Panther Party submitted the recall petition, signed by nearly 35,000 San Franciscans, to the Registrar of Voters of San Francisco.

On January 25, 1983, petitioners' motion to dismiss this case on the grounds that the prosecutions were discriminatory and their motion to suppress evidence were heard. The motion to suppress was denied on January 25, 1983. The motion to dismiss was denied on February 23, 1983.

On February 10, 1983, the sufficiency of the recall petition was certified by the Registrar of Voters. The recall election was set for April 26, 1983.

Trial in this case was held in the San Francisco Municipal Court, Honorable Joseph A. Desmond presiding, commencing on June 13, 1983. Jury verdicts were returned on July 5, 1983 and July 6, 1983.

With regard to the August 14 charges, Stevens, Landberg, and Hueston were acquitted of battery and convicted of false imprisonment. With regard to the August 26 charges, Hueston was acquitted. Landberg, Stevens, and Weissman were convicted of battery. Weissman was acquitted on the California Penal Code section 12025 and 415 charges, and convicted of illegally carrying a loaded firearm in public (California Penal Code section 12031) (RTD 1247:17-1249:21; D 1256:1-1258:8).

Petitioners made motions in arrest of

judgment and for a new trial. Both were heard and denied on July 29, 1983 (RT D 1266 thru 1293).

Sentences were imposed on July 29, 1983. Stevens was sentenced to the maximum sentences of one year and six months in San Francisco County Jail, to be served consecutively (RT D 1303:28-1305:14). Weissman was sentenced to the maximum of six months on the Penal Code section 12031 conviction and six months on the Penal Code section 242 conviction, also to be served consecutively (RT D 1301:15-1303:13). Landberg was sentenced to one year in County Jail on the Penal Code section 236 conviction, with all but 270 days to be suspended, and to six months on the Penal Code section 242 conviction, suspended. Landberg's sentences are to be served concurrently (RT D 1298:33-1301:14). Hueston was sentenced to one year in County Jail with all but 90 days suspended (RT D 1296:18-1298:19).

Petitioners were released on bail pending appeal.

Petitioners appealed the convictions to the Appellate Department of the California Superior Court, City and County of San Francisco (Appeal Nos. CR 3308, 3309, 3310, 3311, 3312, and 3313). On August 26, 1985, the Appellate Department issued its Judgment and Memorandum of Opinion affirming the Judgments of Conviction (App. 1-138a; 155a)

Demurrers to the Complaint

On September 23, 1982, petitioners demurred to the complaints in the August 26 charges. On September 29, 1982, petitioners demurred to the complaints in the August 14 charges. Both demurrers were made on the grounds that the accusatory pleadings did not inform defendants of the nature and the cause of the violations against them (among other grounds). Both demurrers stated that the accusatory pleadings

> violate rights under the Sixth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment

(Notice and Demurrer of September 23, 1982, 1:27-2:1; Notice and Demurrer of September 29, 1982, 1:25-27).

Petitioners specifically raised the Sixth Amendment grounds both in the written Memoranda of Points and Authorities and in oral argument at the hearing.

The demurrers were heard by the San Francisco Municipal Court, Honorable Roy L. Wonder, on October 21, 1982. Judge Wonder overruled the demurrers (see Appendix, pg. 139a).

After the verdicts and before sentencing, petitioners again raised the Sixth Amendment issue in a motion in arrest of judgment. The motion was made on the ground that:

> the complaints violate defendants' right under the Sixth Amendment to the Uni-

> ted States Constitution as applied to the States by the Fourteenth Amendment

among other grounds (Motion in Arrest of Judgment, p. 2).

The motion was heard and denied on July 30, 1983 (RT D 1266:24-1269:25).

Petitioners raised this issue on appeal.

The Appellate Department in its Opinion stated that

> Appellants would like this Court to find that current law violates the 6th Amendment and to change the law to require more specificity in pleadings.

(Appendix, p.20a)

The Appellate Department found that the demurrers had been properly overruled.

The issue was also raised by petitioners in the petition for rehearing (Petition for Rehearing, 8:12-9:5). The petition for rehearing was denied by operation of law on September 25, 1985.

The Motion to Dismiss on the Grounds of Discriminatory Prosecution

Petitioners moved to dismiss the charges on the grounds that the prosecutions were selective on December 20, 1982. The motion was

> based on the Fourteenth Amendment of the United States Constitution and on the California Constitution, as interpreted by Murgia v. Municipal Court (1975) 15 Cal.3d 286.

(Notice and Motion to Dismiss for Discriminatory Prosecution, p.2)

Petitioners submitted considerable evidence proving that there was prosecutorial bias against them as members of the White Panther Party (Appendix, p. 199-219a).

The only evidence submitted by the prosecution was two affidavits, one by the District Attorney and one by the Deputy District Attorney in charge of trial attorneys in that office (Declaration of Arlo Smith, Declaration of Gerald R. Koelling;

Appendix, pp. 232a-243a). The affidavits stated that the prosecutions were not selective and that assault charges are brought against many citizens every year.

The Municipal Court, Honorable Ina L. Gyemant presiding, ruled on February 23, 1982:

> The Court finds that the district attorney's declaration under oath compels this court to the conclusion that defendants have not met their burden of proof.
> And the motion will be denied.

(RT A 175; Appendix, p. 152a)

Petitioners raised this issue on appeal (Appellants' Opening Brief, pp.36-40; Appellants' Reply Brief, 6-7). The Appellate Department ruled that the motion to dismiss had been properly denied (Appendix, p. 35a).

Petitioners raised this issue in the petition for rehearing (p. 11-12). The petition for rehearing was denied by operation of law on September 25, 1985.

The Motion to Suppress Evidence

The arrest of Larry Weissman on August 26, 1982 was made without warrant (RT A 97). Petitioners moved, on December 20, 1982, to suppress as evidence in the case a handgun which was seized from petitioner Weissman by an officer of the San Francisco Police Department. The motion was made

> on the grounds that the search and seizure were without warrant and were unreasonable.

The motion was

> based on the Fourth and Fourteenth Amendments to the United States Constitution, as interpreted by Mapp v. Ohio (1961) 376 U.S. 643...

among other grounds. (Notice of Motion and Motion to Suppress Evidence and for the Return of Property, p. 2.)

The San Francisco Municipal Court, Honorable Ina L. Gyemant presiding, denied the motion to suppress on January 25, 1983 (Appendix, p. 140a-144a).

Petitioners raised the denial of the

motion to suppress evidence on appeal (Appellants' Opening Brief, p. 33-35; Appellants' Reply Brief, p. 5-6). The Appellate Department upheld the denial of the suppression motion (App., p. 27a-28a). Petitioners raised the issue in the petition for rehearing (p. 9-10), which was denied by operation of law on September 25, 1985.

Interference with Petitioners' Right to Subpoena Witnesses in Their Favor

At trial, the defense, during cross-examination, asked prosecution witness Elbert Wiltz, the alleged victim of the August 14 incident, the address of his ex-spouse. Wiltz had been arrested in December 1980 for assaulting his wife with a firearm in violation of California Penal Code 245A (San Francisco Municipal Court Number 376677).

Objections to this question were sustained. (Appendix, p. 222a-225a.)

Petitioners raised the issue on appeal on the grounds that under California law petitioners had a right to discover the address (Appellants' Opening brief, 62-63; Appellants' Reply Brief, 10). The Appellate Department stated in its Opinion:

> Appellants wanted Realla's address for the purpose of subpoenaing her. Once the Court allowed Respondent to subpoena her and Respondent so offered, it was no longer necessary for Appellants to obtain her address.
>
> (Appendix, p. 89a)

Petitioners requested a rehearing on this issue on the grounds that:

> It would be a miscarriage of justice for a conviction to stand which was obtained by . . .(2) the trial court transferring the defendants' Sixth Amendment right to subpoena witnesses to the prosecutor.

(Petition for Rehearing, p. 30)

The petition for rehearing was denied by operation of law on September 25, 1985.

REASONS FOR GRANTING THE PETITION

1. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER ACCUSATORY PLEADINGS SHOULD INFORM DEFENDANTS OF WHAT SPECIFIC UNLAWFUL ACT THE PROSECUTION INTENDS TO PROVE AT TRIAL.

The Sixth Amendment to the United States Constitution guarantees that an accused be informed of the "nature and cause" of the accusation. Petitioners argue herein, and have argued on demurrers to the complaints and since, that the phrase "nature and cause" is not a mere redundancy, but rather that it guarantees two separate rights--one, to be informed of the nature of the accusation, and two, to be informed of the cause.

It is not sufficient to merely inform the accused of the statute he is alleged to have violated, and to tell him the time and place of the violation. The accused also has a Sixth Amendment right to know what alleged act violated the statute.

This Sixth Amendment right ought to be among those made applicable to the states by the Fourteenth Amendment.

> A fundamental principle of due process of law requires that the accused be informed in advance of trial of the specific charges which he must defend. [Cites omitted] While the states have wide latitude to develop their own criminal procedures, they must still afford the accused this basic Constitutional right. Garland v. Washington, 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772 (1914).
>
> Choung v. People of State of California (ED Cal. 1970) 320 F. Supp. 625, 628

In United States v. Hess (1888) 124 U.S. 483, a case involving a federal prosecution, this Court stated a fundamental principle which remains good law today:

> Undoubtedly the language of the statute may be used in the general description of the offence, but it must be accompanied with such a statement of facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which

> he is charged..."[W]here the offence is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter,'" but adding that "to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence. An indictment not so framed is defective, although it may follow the language of the statute."
>
> United States v. Hess, supra, 124 U.S. at 487-488, quoting United States v. Simmons, 96 U.S. 360 (emphasis added)

Petitioners argue that this is a general right applicable in all criminal prosecutions. However, where, as in this case, with respect to the false imprisonment charge, the accused is actually misled as

to the basis of the allegation, then there is a clear violation of the Sixth Amendment, even if the accusatory pleading is held to be adequate in form.

With respect to the false imprisonment charge in this case, defendants were led to believe by the accusatory pleadings (Appendix, p. 178-9a), the circumstances out of which the charges arose, the police report (App. p. 160-170a) and all other discovery, that the basis of the charge was the contention that the defendants had falsely imprisoned the prosecutorially-designated victim for several minutes prior to the arrival of police officers, who then took custody.

At trial, with no notice whatsoever to the defendants, a police officer testified that defendants refused to release the prosecutorially-designated victim for three minutes even after being ordered to do so by police officers:

Q [By Prosecutor]: Did you ever ask the defendants, specifically Mr. Landberg and Mr. Hueston, to let the black man up?
A [Officer Phillips]: Yes.
Q And was there a reply?
A There was a look of confusion on both their faces, looking at me and Mr. Stevens.
Q Then did they let them (sic) -- him, after you asked to let him go?
A After a few minutes they let him up, but that was after Mr. Stevens' direction.
Q And how many times did you have to ask Mr. Landberg and Hueston to let the black man up?
A Two to three times.
Q And that was over the course of a few minutes?
A Three minutes.

(RT D 183:23-184:9; Appendix, p. 226-229a)

This new allegation was a shock and surprise to defendants. If believed by the jury it would have invalidated all of the defenses prepared by defendants, since even if defendants had a right to restrain the alleged victim prior to the arrival of police officers, they certainly could not have had any right to restrain him in vio-

lation of the order of a police officer.

Defendants moved to strike the testimony of the officer regarding the new allegation. The motion was denied. (RT D 555:-21-561:9).

The officer testified on June 17, 1983. The incident that gave rise to the charges occurred on August 14, 1982. Ten months after the incident it was virtually impossible to, in mid-trial, secure independent witnesses to the incident who would have remembered whether defendants did or did not immediately release the alleged victim when told to do so. Had the defendants been notified in the accusatory pleading that they were to be charged with restraining the alleged victim even after being ordered to release him by police officers, then it would have been quite likely that unimpeachable eyewitness testimony countering that allegation could have been obtained. (Ironically, the alleged victim

himself did not recollect being restrained after officers ordered his release. Appendix, p. 230a.

It is generally recognized that it is difficult to persuade a jury that a police officer is swearing to a falsehood. The surprise testimony of the police officer in this case presented an insurmountable problem for petitioners that would not have been possible if the Sixth Amendment right to be informed of the nature and the cause of the accusation had been respected in the accusatory pleading.

Petitioners were in fact convicted of false imprisonment. Since the jury acquitted them of the charge of battery, it follows that the jury did not believe the testimony of the alleged victim. The false imprisonment convictions were therefore in all likelihood based on the testimony of the police officer regarding the alleged false imprisonment after officers ordered

the alleged victim released.

But petitioners urge this Court to also issue a writ of certiorari on the general question of whether an accusatory pleading which does not cite a specific act in violation of a statute violates the Sixth Amendment.

One danger of generalized and conclusionary accusatory pleadings is the possibility of shock and surprise at trial. A second danger is that defense preparations will be unnecessarily complicated by forcing the accused to guess at which of all possible alleged acts the prosecution will eventually rely on at trial, and to prepare a defense to each.

An even more salient danger is that once a conviction has resulted from a vague accusatory pleading, the court at sentencing has no certain way of determining precisely what the accused was convicted of. To use this case as an example, were the

defendants convicted of falsely imprisoning the alleged victim prior to the arrival of police officers--which would, from a sentencing perspective, be perhaps regarded as bad judgment--or were the defendants convicted of falsely imprisoning the alleged victim after the arrival of police officers--which may well be taken as a defiant and dangerously criminal act. There is no sure way to tell, short of asking the jury, which of course is impermissible on many grounds.

A similar problem exists with respect to the charge of battery arising out of the second incident, on August 26, 1982. The prosecution argued alternatively that the defendants either attacked the alleged victim unprovoked, or else that, if they were defending themselves, they used excessive force (RT D 329:13-339:3; D529: 20-530:5). But the accusatory pleading did not present two counts. Which act did the

jury actually convict defendants of? Should a sentencing court regard defendants as having committed the relatively atrocious act of battering a perfect stranger for no reason or the relatively more understandable act of getting carried away in what was originally a self-defense effort?

Particularly with respect to petitioner Stevens, the trial court imposed the maximum sentence provided by law and ran the two sentences consecutively, so it may be inferred that these troubling questions were resolved adversely to petitioner Stevens. But given the ambiguous accusatory pleadings, what guarantee is there that the acts for which petitioner was convicted by the jury are the same acts for which he was sentenced by the trial court?

The anticipated counter-argument will be that under the "modern simplified rules of pleading" it is permissible in California and many other states for the prosecu-

tion to charge "in the language of the statute". California Penal Code §952.

But modern simplified pleading would be reduced to absurdity if it were taken to mean that the accused now has only a right to be told how the statute reads. A pleading in the form

> ...said defendants did wilfully and unlawfully violate the personal liberty of Elbert Wiltz.

is plainly insufficient (Appendix, 179a). Yet that is all the defendants were informed of in the charges in this action, and that is all the accused are informed of in a great number of boilerplate accusatory pleadings in modern times.

In felony cases, the accused not only receives an accusatory pleading, but also obtains a preliminary hearing or grand jury transcript. This narrows down the basis of the charges. People v. Pierce (1939) 14 Cal.2d 639. But there is no such

protection in misdemeanor cases. Lamadrid v. Municipal Court (1981) 118 C.A.3d 786, 790-791.

In misdemeanor cases, the accused receives a police report, and perhaps some statements by prospective witnesses. But there is no requirement in California, as shown in this case, for the prosecution to divulge the content of an oral statement it has received from a prosecution witness (People v. Alexander (1983) 140 C.A.3d 647. And there is no requirement that police reports or other statements include all the testimony the police officers may eventually give. The accused can, unless the Sixth Amendment right to be informed of the nature and cause of the offense is respected, be left totally in the dark regarding the basis of the charge against him.

There is no provision for any bill of particulars. There is no provision for

interrogatories or depositions.

There is an enormous potential for abuse. In the present case, that potential was actualized.

Neither the California Supreme Court nor any other California court has so far passed on the constitutionality of California Penal Code § 952 as it applies to misdemeanors. Consequently, there is very little authority that bears on the precise question raised herein. For the most part, this is because prosecutors don't regularly abuse the latitude they are presently given in framing their accusatory pleadings. But the Bill of Rights requires more than that the government refrain in most cases from violating the rights of the accused. It requires clear, reliable safeguards against such violations that are universally applicable. That there are presently no such safeguards embodied in binding case law is evident from what

transpired in the present case.

Petitioners admit that clear authority that a defendant has a right to be informed of the nature and cause of the accusation would have a widespread impact on quotidian functions of local prosecutors. The present method of glancing at a police report, thoroughly gauging the type of violations asserted therein, ascertaining the number of the appropriate statute, and treating preparation of the accusatory pleading as merely a clerical matter from that point on would be proscribed.

Prior to filing accusatory pleadings, prosecutors would have to scrutinize the case with the disciplined and analytic skills needed to prepare a complaint in a civil action. Very likely, many accusatory pleadings would never be filed, saving crucial time of the courts, the defendants and their counsel, and of the prosecutors themselves.

However, no legitimate law enforcement function would be impeded. No otherwise guilty person would escape prosecution as a result of a requirement that the specific provable act alleged to have been committed must be stated in the accusatory pleading.

Sometimes, of course, there would be some detail or other which would be in the accusatory pleading but would turn out not to be the case at trial. It is well-settled, however, that an immaterial variance between the pleading and the proof is not grounds for reversal. So prosecutors would experience no difficulty in this respect.

Retroactivity is also an issue which this Court would have to confront should it decide the present issue in favor of petitioners. As things now stand however few accusatory pleadings are demurred to, and a failure to demur waives the defect of vagueness in the pleading. Consequently, retroactivity would not upset an unduly

large number of convictions.

In summary, a stricter interpretation of the nature and cause provision of the Sixth Amendment would prevent the serious abuse which has arisen in the present case, would contribute to the efficency and effectiveness of the criminal justice system, and would not impede any aspect of law enforcement.

2. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER CONCLUSIONARY AFFIDAVITS BY THE PROSECUTOR THAT THE PROSECUTION IS NOT SELECTIVE IS SUFFICIENT GROUNDS FOR DENIAL OF A MOTION TO DISMISS BASED ON SUBSTANTIAL EVIDENCE THAT THE PROSECUTION IS SELECTIVE.

This Court has long held that the equal protection clause of the Fourteenth Amendment is violated if a criminal prosecution is deliberately based on an unjust-

ifiable standard such as race or some other arbitrary classification. Oyler v. Boles (1961) 368 U.S. 448; Two Guys v. McGinley (1961) 366 U.S. 582; Yick Wo v. Hopkins (1886) 118 U.S. 356; see also United States v. Steele (9th Cir. 1972) 461 F.2d 1148; United States v. Berrios (2d Cir. 1974) 501 F.2d 1207.

This holding was transmuted into binding California authority in Murgia v. Municipal Court (1975) 15 Cal.3d 286:

> Neither the federal nor state Constitution countenances the singling out of an invidiously selected class for special prosecutorial treatment, whether that class consists of black or white, Jew or Catholic, Irishman or Japanese, United Farmworker or Teamster. If an individual can show that he would not have been prosecuted except for such invidious discrimination against him, a basic constitutional principle has been violated, and such a prosecution must collapse upon the sands of prejudice.
>
> Murgia v. Municipal Court, supra, 15 Cal.3d at 290

In this case, petitioners presented considerable evidence that there was a prosecutorial bias against them as members of the White Panther Party (Appendix, 199a-219a).

Petitioners also argued that but for this bias, there would have been no prosecution. This second argument was based primarily on the fact that in both instances police officers came upon a scene that indicated mutual combat (in fact, in both instances petitioners were doing no more than restraining a previously violent assailant). Even from the perspective of the police reports, mutual combat was indicated (App., p. 165-169a, 176a). Yet in both instances, members of the White Panther Party were arrested and prosecuted, while those who had, according to the White Panther Party members, assaulted them, were neither arrested nor prosecuted.

Since both incidents took place with-

in two weeks after the White Panther Party members began circulating a petition to recall the Mayor of San Francisco, and since the prosecution took place during the petition campaign and after the petition had been qualified for the ballot, there was a strong showing that the prosecution may well have been selective. The recall campaign was a nationally disputed and bitter one which focused considerable government antagonism against the White Panther Party, which was recognized to be its organizers.

Above and beyond the fact of the recall campaign, petitioners presented evidence of prior prosecutions against White Panther Party members, nearly all of which involved situations where individuals came to places associated with the White Panther Party and, when fights ensued, claimed to be the victims of violent attacks by the Panthers. In all of these

instances, no Panther ever actually injured any alleged victim, but there invariably were charges that the Panther tried to inflict injuries. The general pattern would make the Panthers out to be the most incompetent assailants in history.

Still further, evidence which demonstrated various reasons for a prosecutorial animus against White Panther Party members was also presented. (See App., p. 199-219a)

To counter this, the District Attorney's office simply submitted two affidavits stating that the prosecutions were not selective, and that assault charges are brought against many citizens each year (Appendix, 232a-243a).

The trial court held that this alone compelled a finding that "defendants have not met their burden of proof." (Appendix, 152a)

Petitioners contend that where there is a substantial showing of selectivity in

a prosecution, the prosecution must at a minimum come forward with some explanation for why the defendants are prosecuted. This is particularly true when there is at least as much reason to believe that the prosecutorially-designated victims assaulted the prosecutorially-designated defendants, as the other way around. And it is even more particularly true when the defendants were, at the time of the incidents that gave rise to the charges and at the time of the prosecution, involved in a bitter political campaign against powerful local government interests.

Federal authority indicates that these circumstances require more than an affidavit from the prosecutor denying selectivity.

However, the prevailing Federal authority, while it certainly implies that a mere affidavit is not sufficient, does not actually state that more is required, thus leaving considerable room for abuse of

discretion by local judges perhaps gripped by an animus similar to that which inspires the prosecution.

Clear, more specific Federal authority is urgently needed, and the present case entails facts which may well make it a proper case in which to formulate clearer authority.

3. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A CITIZEN'S ARREST CAN BE USED BY POLICE TO EVADE THE FOURTH AMENDMENT; AND, IF THE STATE RELIES ON A CITIZEN'S ARREST, WHETHER IT MUST SHOW THAT THE CITIZEN HAD A LEGAL RIGHT TO MAKE THE ARREST.

Petitioner Weissman was convicted of carrying a loaded firearm in a public place (Cal. Penal Code §12031). There was no allegation or claim by anyone that he used the firearm. One police officer testified that the weapon was concealed (RT D 483:17-484:4; 486:7-11; 512:3-513:16), but

the jury acquitted Weissman of that charge (RT D 1256:14-23). In California a citizen can lawfully carry a loaded firearm in a public place when he

> reasonably believes that the person or property of himself or another is in immediate danger and that the carrying of such weapon is necessary for the preservation of such person or property.

California Penal Code Section 12031(j).

Petitioner Weissman asserted, at a motion to suppress, his state and Federal right to exclude evidence seized as a result of an unlawful search. Since there was no warrant, the prosecution had the burden of showing that the search was lawful. (Coolidge v. New Hampshire (1971) 403 U.S. 443, 454; People v. Haven (1963) 59 Cal.2d 713,717.) The prosecution produced one witness, a police officer who testified that he conducted the search pursuant to a citizen's arrest made by the alleged victim of the August 26 incident, Troy Chris-

tensen (Appendix, 197a).

Christensen did not testify at the suppression motion (App., 139a). There was no evidence introduced other than pure hearsay which indicated Weissman had done anything unlawful prior to being arrested, or even that he had done anything that could have been regarded as suspicious for the purpose of probable cause. The police officer who testified admitted that he did not see any of the alleged actions for which Weissman was arrested (Appen., 192a).

In fact, Weissman had been arrested and held at gunpoint by a "patrol special officer"[1], Ernest Radley. (Appendix, 193-4a) Such officers are held to be "state

1. The San Francisco City Charter provides for "patrol special officers" in Section 3.536. "Patrol special officers" are a special category of police officer employed by private parties but regulated by and exercising power pursuant to contract with the San Francisco Police Commission.

agents" for the purpose of the Fourth Amendment. Williams v. United States (1950) 341 U.S. 97; United States v. Lima (DC App. 1980) 424 A2d 113; People v. Zelinski (1979) 24 Cal.3d 357.

There was a conflict of testimony at trial as to whether Weissman was holding the alleged victim on the ground when he was arrested by the patrol special officer or whether he was standing on the stairs of a house. For purposes of appellate review of errors at trial, the former version must be accepted by the Court since it is the version most favorable to the prosecution. But for the purposes of review of the denial of the suppression motion there was no evidence submitted by the prosecution on this issue, and therefore this Court is not bound by any factual finding. The police officer who testified at the suppression hearing stated that he arrived at the scene while Weissman and others

were being held at gunpoint by the patrol special officer and saw nothing criminal prior to carrying out the search (Appendix, p. 192a-193a).

The prosecution took the position that it didn't make any difference what Weissman was doing when he was arrested, since in cases where a citizen signs a citizen's arrest card, all subsequent searches and seizures are automatically permissible and the Fourth Amendment affords no protection whatsoever.

Petitioners seek certiorari on the question of whether an arrest by a police officer can be retroactively transformed into a citizen's arrest in order to evade the Fourth Amendment, and secondly, whether, if the state relies on a citizen's arrest, the prosecution needs to show that there was probable cause for the citizen to make the arrest. People v Martin (1964) 225 C.A.2d 91.

Petitioners point out that the good-faith exception to the exclusionary rule enunciated in U.S. v. Leon (1984) __U.S.__; 104 S.Ct. 3405 (No. 82-1771) is not applicable here. If the arresting officer had believed he was acting in good faith, he would not have needed to transfer the responsibility for the arrest to a citizen who, whatever he did prior to the arrival of police, did not at any point place Weissman under arrest. (RT D 476:17-485:1; 488:18-492:8; D 329:27-339:28; 341:26-343:26)

In fact, it was admitted by the prosecution that the patrol special officer was holding five persons associated with the White Panther Party at gunpoint (App., 192a-193a), four of whom had at the very most committed a misdemeanor out of the presence of the patrol special officer. The fifth person, Weissman, was belatedly claimed to have been seen by the patrol special officer "on top of one person, hitting, striking, in a battle" (RT D 424:4-5).

If this claim were true, then the patrol special officer could have taken responsibility for the arrest, and the issue of probable cause would have turned on the credibility of his claim. But the prosecution chose to avoid this path.

Thus, although a search and seizure was conducted without a warrant by a police officer, and even though the prosecution did not produce a scintilla of evidence at the suppression hearing that the victimized citizen had done anything unlawful prior to the search, the evidence seized was admitted against him at trial.

It could not have been the intent of the Framers of the Constitution and its Bill of Rights that citizens would eventually come to be so easily deprived of the protection of the Fourth Amendment.

4. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS

FOR OBTAINING WITNESSES IN DEFENDANT'S FAVOR CAN BE TRANSFERRED TO THE PROSECUTION.

The independent Federal grounds on which this question relies did not arise until the Opinion of the Appellate Department was issued.

Until that point the issue was the relatively routine one of whether an objection to a relevant question had been improperly sustained by the trial court.

The defense asked of a prosecution witness, Elbert Wiltz, the alleged victim of the August 14 incident, the address of his ex-spouse. Wiltz had been arrested three years before the trial for assaulting his wife with a deadly weapon, namely a firearm. The arrest was not admissible, but the character testimony of a person who was familiar with his violent character would have been admissible, and very valuable to the defense. (California Evidence Code Section 1103.)

The witness and the prosecution announced in front of the jury that if defendants were given the witness's ex-wife's address, she would be in danger from defendants (App., p. 223-225a). The jury did not know about the arrest of Wiltz on the complaint of his ex-spouse, so the irony of the prosecution's claim was clear only to the court, the defendants, and the prosecution itself.

The judge sustained the objection, leaving the jury with the unmistakable impression that the trial court itself believed the defendants would be likely to injure any person related to a prosecution witness whose address they may have learned. This denial, with no showing by the prosecution of harm to the witness, is directly contrary to California law. People v. Benjamin (1975) 52 C.A.3d 63,73.

The Appellate Department agreed that there was no showing of danger to the wit-

ness. However, it opined:

> Appellants wanted Realla's address for the purpose of subpoenaing her. Once the Court allowed Respondent to subpoena her and Respondent so offered, it was no longer necessary for Appellants to obtain her address.

Appendix, p. 89a, emphasis added.

This ruling plainly violated defendants' rights under the Sixth Amendment.

We live in a time when citizens are with increasing frequency confronted with accusations of violence made by persons unknown to them whose credibility must be challenged in front of a jury that sees the weight of government, often the mass media, and sometimes, as here, even the court, endorsing that witness. This is a difficult plight for any citizen. If the traditional possibility of discrediting a prosecution witness by showing his bad character is removed or rendered impossible by a bar to obtaining witnesses familiar with such character, then few citizens charged with

violent crimes by prosecutors will have any real chance of proving their innocence. When, as here, the prosecutor is allying himself with a person he knows to be a violent criminal in order to obtain a conviction of a citizen who happens to be politically disfavored, it is not easy to avoid the use of the adjective "fascist" in describing this process.

The Sixth Amendment plainly precludes taking the right to have compulsory process to obtain witnesses away from the defendant and replacing it with a dubiously effective dependence on the prosecution to subpoena crucial witnesses for the defense.

5. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER VIOLATIONS OF STATE LAW BY THE STATE JUDICIARY GIVE RISE TO AN INDEPENDENT FEDERAL GROUND OF DENIAL OF THE EQUAL PROTECTION CLAUSE OF

THE FOURTEENTH AMENDMENT.

With respect to this point, it is admitted by petitioners that if there is any rational basis whatsoever for the application of state law by a state court, then the state court opinion is final, and cannot be reviewed by the United States Supreme Court on certiorari.

But what if there is no rational basis whatsoever for a state application of state law? What if the denial of equal protection of state laws is so flagrant that to leave stand a conviction obtained thereby would be to condone the reduction of a United States citizen to a status of complete rightlessness? What if it is indisputably clear that a state court is engaging in deliberate violation of state laws in order to secure the opportunity to punish a disfavored citizen? Can the United States Supreme Court then take jurisdiction on cer-

tiorari even if there are no independent Federal grounds other than the plain denial of equal protection of state laws?

It is conceded that the denial of equal protection of state laws by a state court was not set up as an independent Federal grounds by petitioners while the action proceeded in state court.

There is presently only very slender authority for the proposition that when a state judiciary permits clear violations of state law, the denial of equal protection that flows therefrom is a violation of Federal constitutional rights secured by the Fourteenth Amendment, and that therefore the United States Supreme Court can take jurisdiction on certiorari to remedy the injustice.

The facts of the present case show, however, how empty the guarantees of due process of law and equal protection of laws are when a state court resolves to

deprive certain disfavored citizens of these rights.

In Hicks v. Oklahoma (1980) 447 U.S. 343, the Oklahoma state judiciary affirmed a forty-year prison sentence imposed in violation of the defendant's state-created right to have his sentence determined by a jury not misinstructed regarding unconstitutional mandatory sentencing laws.

The United States Supreme Court reversed and remanded for retrial on the issue of sentencing.

> Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. Greenholtz v. Nebraska Penal Inmates, 442 US 1, 60 L Ed 2d 668, 99 S Ct 2100 (1979), and that liberty interest is one

> that the Fourteenth Amendment preserves against arbitrary deprivation by the State. [Cites omitted.]
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> Hicks v. Oklahoma, supra, 447 U.S. at 346

It would appear then that some clear violations of state law by state judiciaries are reviewable on certiorari by the Unites States Supreme Court. But of course it is crucial to Federalism, as well as to judicial administration, that the United States Supreme Court not be called upon to take jurisdiction over every claimed violation of state law by state courts. As is always the case with maintaining the Federalist balance, the question to decide is how to safeguard the latitude of state courts in arriving at their own independent and final evaluations of the applicability of state law without giving the tacit endorsement and approval of the ultimate judicial protectors of the liberty of the citizenry, the United States

Supreme Court, to manifest atrocities.

Petitioners urge this Court to discern the flagrancy of the denials of equal protection of state laws which are recited here. Given this flagrancy, petitioners argue that they cannot, in any meaningful sense, be said to have been convicted through due process of law. In fact the compulsion to obtain convictions so animated the prosecution, the trial court, and the appellate panel which affirmed the convictions that to let these convictions stand ultimately would be to indelibly stain the very tradition of judicial protection of the rule of law. When it is taken into account, as is clear from the record in this case, if not from common knowledge, that petitioners are not criminals seeking to evade punishment for their acts by seizing upon some technicality of law, but political activists struggling against repression, then the danger of

toleration by the Supreme Court of flagrant violation of state laws by state judges is evident, and the issue of law raised is one of fundamental importance.

The following three instances of flagrant violations by the state judiciary of state law show the urgency of review by this Court of the denial of defendants' rights under the Fourteenth Amendment.

(1) The alleged victim of the August 26 incident, Troy Christensen, did not testify at trial (RT B 131:3-19). Petitioners were convicted mainly on the strength of testimony of a friend (Markley) of the alleged victim who testified he saw petitioners attack the alleged victim (RT D 329:13-339:3).

Petitioners moved for a new trial. One day prior to the hearing on the motion petitioners received in the mail attached to the prosecution's sentencing recommendation a partial copy of a declaration

from the alleged victim (apparently by accident) admitting he initiated the physical conflict:

> "I tried to grab the fellow who was earlier on the stairs by grabbing him before he had a chance to do any more damage to the car. . . "

(See A.O.B., 86; Statement on Appeal; App. 115a) Petitioners had never previously seen nor been informed of the existence of this declaration.

At the hearing on the motion for a new trial, petitioners moved the trial court to exercise its discretion pursuant to California Penal Code §1181(8) so that this new evidence could be properly assessed (RT D 1270:9-1271:1; 1280:28-1284:5).

The trial court refused to grant the continuance and refused to consider the new evidence. Petitioners several times brought to the court's attention Penal Code Section 1182 which requires the application for a new trial to be "made and deter-

mined before judgment." Nevertheless, the trial court stated that petitioners could bring another motion for a new trial at a later date and then proceeded to judgment and sentencing forthwith (RT D 1282:5-1284:8, 1288:3-17), thereby foreclosing petitioners from raising the motion.

The Appellate Department agreed that

> Penal Code section 1182 requires that an application for a new trial must be made and determined before judgment (and thus sentencing).

(Appendix, pg. 116a)

Nevertheless, the Appellate Department condoned, in opaque and implausible reasoning, this violation and commented:

> Appellants were allowed to file a new trial motion based on new evidence later. However, Appellants never filed another motion. Since Appellants never again presented the new evidence, Appellants cannot complain about the evidence not being considered....even if the new evidence had been considered by the Court, the new trial motion most likely would

> have been denied. Christensen's statement merely would have impeached or discredited Markley's testimony, a ground which does not compel the granting of a new trial.

(Appendix, pg. 117-118a)

State law holds that when the trial court misconceives or refuses to do its duty in regard to a motion for a new trial and denies defendant the reasonable opportunity for argument, a new trial must be granted. People v. Ashley (1954) 42 Cal.2d 246.

Petitioners have been prematurely sentenced and, more importantly, petitioners have yet to be heard on a valid motion for a new trial, which motion they have a well-recognized right to make.

(2) Petitioners have a right under state law to present to the jury evidence of the nature and number of the felony convictions of witnesses against them. People v. Terry (1974) 38 C.A.3d 432, 446. The Appellate Department recognized this right,

recognized that it had been violated, but then stated that the error actually helped petitioners since

> the jury was allowed to speculate that the prior felony conviction was worse than it actually was (i.e., worse than robbery or ex-felon in possession of a concealable firearm -- D. Wiltz's priors).

Appendix, page 74-75a.

This is simply not good faith reasoning. The Appellate Department was approving a clear violation of state law.

(3) Petitioners were not even permitted to argue that the witnesses against them from the police department and the District Attorney's office were testifying falsely. The trial court actually sustained an objection to this fundamental line of argument, and foreclosed further argument to that effect.

A preposterous interference with the right to make a final argument (statutory in California according to Cal. Penal Code

§1093; see People v Manning (1981) 120 C.A.3d 421, 423) occurred at trial, and the Appellate Department made a flagrantly false statement in approving of this interference:

> There was no evidence submitted from which Appellant Stevens could properly infer the police department and/or D.A.'s office were dishonest.

Appendix, p. 14a.

Is the testimony of defendants Stevens and Weissman contrary to the testimony of police officers to be regarded as no testimony at all? Did defendants not have a right under governing standards of due process to argue to the jury that their testimony was honest and that that of some of the police officers was not honest? To deny this right would obviously be to reduce the trial process to absurdity.

Yet that right was denied.

These denials of rights under state law do not entail ambiguous points of law.

The denials are clear, flagrant, and, as is obvious from the specious reasoning with which the Appellate Department attempted to justify them, deliberate.

Convictions could not have been obtained without employment of such means. The Appellate Department at several points asserts that the evidence was sufficiently strong that errors at trial were not harmful, but nowhere in its 69 page Opinion is there any analysis of what the Appellate Department considered that "strong" evidence to be.

In fact, the evidence was a series of for the most part uncorroborated testimony from prosecution witnesses who each claimed to see different things. Petitioners in their Opening Brief reviewed objectively and meticulously the evidence produced against them at trial (pp. 22-29). This review was not contradicted by the Appellate Department, but rather ignored.

Petitioners do not include this somewhat lengthy document in this petition for writ of certiorari, and recognize that to some extent they make an undocumented assertion in this sense. However, petitioners represent and aver to this Court that they sincerely believe that a review of the evidence by this Court, should the petition be granted, will reveal that the evidence produced at trial by the prosecution was in fact minimal.

The Appellate Department assessed the evidence against petitioners so carelessly that on page 43 of the Opinion (Appendix, p.86a) petitioners are stated to have been "beating him" (Wiltz) even though the jury returned an acquittal on the battery charges arising out of that incident.

The United States Supreme Court should not let stand convictions which so flagrantly violate the rights of United States citizens to due process of law and to equal

protection of all laws, including state laws interpreted by state courts.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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